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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 130 3

Iva Lee Hudson and Tommy Ray Hudson,
Petitioners,

versus

The United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February, 1971

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In the
Supreme Court of the United States
October Term, 1970

No. _____

IVA LEE HIGDON and TOMMY RAY HIGDON,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners, Iva Lee Higdon and Tommy Ray Higdon, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on January 5, 1971.

OPINIONS BELOW

The official and unofficial reports of the opinion of the United States Court of Appeals for the Tenth Circuit have not been printed to date, but attached in Appendix "A" is the opinion of the Tenth Circuit Court of Appeals. There was no opinion in the United States District Court for the Western District of Oklahoma, only a judgment was en-

tered. The transcript of this District Court proceeding is attached in Appendix "B." The certified copies of the transcripts in each of the cases have been sent to the Clerk of the United States Supreme Court.

JURISDICTION

The Court of Appeals confirmed the judgment of conviction as to petitioners on December 22, 1970. A timely petition for rehearing was denied on January 5, 1971. This Petition for Certiorari was filed less than thirty (30) days from the date aforesaid. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the trial judge abused his discretion in that he failed to make use of any of the resources available to him in determining proper sentence for the petitioners.

STATUTORY PROVISIONS

This case involves 18 U.S.C. §2113(a) and (d), which provides:

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

"Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank or as a savings and loan

association, with intent to commit in such bank, or such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association in violation of any statute of the United States, or any larceny—

"Shall be fined not more than $5,000 or imprisoned not more than 20 years or both.

"(d) Whoever, in committing, or in attempting to commit, any offense defined in sub-sections 'a' and 'c' of this section, assaults any person or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than 25 years, or both."

This case also involves 18 U.S.C. §3, which provides:

"Whoever, knowing that offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial and punishment, is an accessory after the fact.

"Except as otherwise expressly provided by an act of Congress, an accessory after the fact will be imprisoned not more than one-half (1/2) the maximum term of imprisonment or fine enough more than one-half (1/2) the maximum fine prescribed for punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned for not more than ten (10) years."

STATEMENT OF FACTS

On March 10, 1970, Iva Lee Higdon pleaded guilty to being an accessory after the fact of a bank robbery committed in Terral, Oklahoma, on November 20, 1969. Iva Lee Higdon is the wife of co-petitioner, Tommy Ray Higdon, who pleaded guilty to a violation of §2113(a) and (d) of Title 18, U.S.C. There was no actual violence involved in the bank robbery and Tommy Ray Higdon voluntarily admitted his guilt.

Mrs. Higdon's participation in the crime consisted exclusively of driving her husband from Terral, Oklahoma, to Nocona, Texas, after the robbery. Mrs. Higdon has no record of any previous offenses. She at no time carried a gun, endangered the life of anyone, or violently resisted arrest.

The United States District Court for the Western District of Oklahoma had jurisdiction because of the federal crime committed. The trial judge of this Court sentenced Iva Lee Higdon to imprisonment for a term of ten (10) years, and Tommy Ray Higdon for a term of twenty (20) years.

The United States Court of Appeals for the Tenth Circuit affirmed the ruling of the trial court.

REASONS FOR GRANTING THE WRIT

The trial judge abused his discretion in imposing sentence by doing so without regard to the information contained in the pre-sentencing report and presented at the sentence hearing. It is a well-recognized principle that, although a trial judge has wide discretion in the manner of sentencing, an abuse of that discretion will be corrected on appeal. The Court has recognized this principle in the case of *Williams* v. *United States*, 402 F.2d 47 (10th Cir. 1967). That case said:

> "Discretion [as to sentencing] is properly placed in the trial judge and absent abuse will not be disturbed there." [Emphasis added.]

See also *United States* v. *Frank*, 245 F.2d 284 (3rd Cir. 1957); *U. S.* v. *Consentino*, 191 F.2d 574 (7th Cir. 1951); and *Price* v. *United States*, 200 F.2d 642 (5th Cir. 1953).

Evidence of the trial court's abuse of discretion is found in the transcript of the proceedings at arraignment. *Page 15 of the transcript, line 25:*

> "So with these things I want you to know Mrs. Higdon, and Mr. Higdon, that the punishment in this case is not going to be a token punishment at all."

Also speaking of the robbery, at *page 16, line 9:*

> "It's no worse than robbing a filling station or a grocery store. They are all probably the worst crimes that I know of except murder."

And, further, on *page 16 of the transcript*, at line 24, by the court:

"I'll give you all the time you want to talk either now or then, but I just don't want her thinking that a plea of guilt is going to bring about something less than taken punishment."

These statements were both made at the time of arraignment before the judge had considered the pre-sentence report or made other considerations before sentencing.

Evidence of the trial court's disregard for the information presented by counsel at the sentencing hearing is found at page 22 of the transcript. There, after the petitioner's attorney had informed the trial court that arrangements had been made to enable the petitioner, Iva Lee Higdon, to live with her mother-in-law if she received probation, the trial court said:

"Well, it's very nice, but the way the court looks at these things and the way Congress looked at them is not the way you look at them, Mr. Abel."

On page 20, beginning at line 6, the following exchange is recorded, which also manifests the trial judge's indifference to the effect of sentence on the petitioners:

"I think the court also ought to take into consideration, I don't recall if it's shown in the pre-sentence report, but I know the United States Attorney's office has informed the probation officer they have no objection to her receiving probation. (By Mr. Abel)

The Court: They don't have anything to do with it.

Mr. Abel: I know they don't, but I want the Court to know that fact.

The Court: Well, that doesn't make any difference."

The fact that a judge's failure to use the resources available to him in determining sentence is an abuse of discretion which was recognized by the District of Columbia Court of Appeals in the case of *Leach* v. *United States*, 334 F.2d 945 (1964). In that case, the defendant was convicted of robbery and appealed. The case was remanded on appeal for reconsideration of the sentence. The trial judge reinstated the original sentence and on further appeal the Court held that the trial judge's refusal to enter the defendant for a mental examination constituted an abuse of discretion where the examination was requested by the defendant. The pre-sentence report showed the defendant as a psychopathic offender and that defendant had a record of extreme recidivism. In that case, the Court said:

> "We do not question the general rule and an appellate court will not ordinarily review sentences that are within the statutory maximum. We hold only that the sentencing judge should use some of the resources which Congress has provided and that he may not arbitrarily ignore data properly obtained thereby."

In the present case it is obvious that the trial judge failed to use any of the resources available to him in determining a proper sentence for the defendant. In this case the trial judge obviously manifested an indifference to the information and resources available to him in determining the proper sentence for the petitioners. He ignored the pre-sentence report and the information presented to him at the sentencing. It is also clear that the appellate court overlooked and misapprehended these facts.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February, 1971

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit
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Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER TERM—1970

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TOMMY RAY HIGDON, Defendant-Appellant.	)	No. 285-70
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. IVA LEE HIGDON, Defendant-Appellant.	)	No. 286-70

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(Dist. Ct. Cr. Nos. 70-29 and 70-67)

Ed Abel (Lampkin, Wolfe & Sokolsky were with him on the briefs) for Defendants-Appellants.

William R. Burkett, U.S. Atty., for Plaintiff-Appellee.

Before PHILLIPS, PICKETT and HILL, Circuit Judges.

(APPENDIX)

Per Curiam.

On November 26, 1969, Tommy Ray Higdon and another person robbed the First National Bank of Terral, Oklahoma, the deposits of which were insured by the Federal Deposit Insurance Corporation, of $8,700, by putting in jeopardy the life of Ishmael McGuiness by the use of a dangerous weapon, to wit, a pistol, in violation of 18 U.S.C. § 2113 (a) and (d).

Higdon entered a plea of not guilty. He escaped from custody. Thereafter, he was apprehended, withdrew his plea of not guilty, and entered a plea of guilty.

Iva Lee Higdon, his wife, waited in an automobile, and after the robbery had taken place drove Higdon away from the scene and aided him in avoiding apprehension. She was duly charged by information as an accessory after the fact, in violation of 18 U.S.C. § 3, and entered a plea of guilty to such charge.

After the pleas of guilty had been entered, the trial judge stated to the Higdons that he regarded armed robbery as a very serious offense, and, in effect, said he wanted them to know that the sentences he would impose would not be light because they had entered pleas of guilty, but that he would have to wait until he had received and considered the presentence reports by the probation officer before deciding the sentences he would impose on them.

The sentence prescribed for a violation of 18 U.S.C. § 2113(d) is imprisonment for not more than 25 years or a fine of not more than $10,000, or both. The sentence prescribed for a violation of 18 U.S.C. § 3, as accessory after the fact, is imprisonment for not more than one-half the maximum term of imprisonment or a fine of not more than one-half the maximum fine prescribed for the punishment of the principal, or both.

After the presentence reports were received and considered by the court, the Higdons appeared in open court

in person and with their self-employed attorney. The attorney made a plea for the probation of Iva Lee Higdon. He advised the trial judge that she was a first offender; that arrangements had been made for her to live with her mother-in-law in Dallas, Texas; and that the United States Attorney had advised the probation officer that he had no objection to probation for Mrs. Higdon. The court stated that the fact the United States Attorney did not object to probation did not "make any difference."

The court sentenced Higdon to imprisonment for a term of 20 years and Mrs. Higdon for a term of 10 years.

Each of the Higdons has appealed.

Higdon asserts that the trial judge abused his discretion in determining the sentence imposed on him, and Mrs. Higdon asserts the trial judge abused his discretion in determining the sentence imposed on her.

One ground on which they predicate their contention is the statement of the trial judge, following the pleas of guilty, that he regarded armed robbery as a very serious offense and that they would not receive a light sentence, and the trial judge's statement with respect to the statement in the presentence report that the United States Attorney did not object to probation.

We see no basis whatever in such statements by the trial judge for the contention of an abuse of discretion.

The Higdons further contend that in determining the respective sentences he would impose on them, the trial judge ignored matter in the presentence report and other pertinent facts available to him.

We have carefully examined the record and find no support therein for such contention. In fact, we think it affirmatively refutes such contention.

Accordingly, the judgment in each case is affirmed.

APPENDIX B

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By (Illegible)
Deputy

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.) No. 70-29 (Cr.)
TOMMY RAY HIGDON,)
Defendant;)

and

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.) No. 70-67 (Cr.)
IVA LEE HIGDON,)
Defendant.)

BEFORE:

HONORABLE LUTHER BOHANON
United States District Judge

PROCEEDINGS AT ARRAIGNMENT
March 19, 1970;

PROCEEDINGS AT SENTENCING
April 3, 1970.

Oklahoma City, Oklahoma

APPEARANCES:

For the Plaintiff:

William Burkett, U. S. Attorney
Western District of Oklahoma
Oklahoma City, Oklahoma
(Present March 19, 1970)

Jeff Laird, Assistant U. S. Attorney
Western District of Oklahoma
Oklahoma City, Oklahoma
(Present April 3, 1970)

For the Defendants:

Edwin D. Abel, Attorney at Law
Cravens Building
Oklahoma City, Oklahoma

PROCEEDINGS AT ARRAIGNMENT
March 19, 1970

THE COURT: The court convened a little earlier at the request of the attorneys in the United States versus Tommy Ray Higdon and Iva Lee Higdon.

Are the parties here and ready to proceed?

MR. BURKETT: The Government is ready, your Honor.

MR. ABEL: Yes, sir.

THE COURT: Do you have a statement to make in this case?

MR. BURKETT: With reference to Tommy Ray Higdon, if the Court please, he is present in court and with his Court appointed counsel, Mr. Ed Abel; and the Government is advised that Mr. Higdon desires to change his plea.

MR. ABEL: That is correct, your Honor.

THE COURT: Mr. Abel, do you have a statement to make in connection with this matter?

[APPENDIX]

MR. ABEL: Yes, sir.

The U. S. Attorney has correctly informed the Court. Mr. Higdon, after counseling with me, would desire to change his plea.

THE COURT: Mr. Higdon, you heard the statement, did you not, of your attorney?

DEFENDANT TOMMY RAY HIGDON: Yes, sir.

THE COURT: You heard the statement of the District Attorney?

DEFENDANT TOMMY RAY HIGDON: Yes, sir.

THE COURT: Is it your desire to withdraw your plea of not guilty in this case?

DEFENDANT TOMMY RAY HIGDON: Yes, sir.

THE COURT: The Court will permit you to withdraw your plea of not guilty in this case.

Do you understand what you are charged with?

DEFENDANT TOMMY RAY HIGDON: Yes, sir.

THE COURT: For the record, just what are you charged with in this case?

DEFENDANT TOMMY RAY HIGDON: Bank robbery.

THE COURT: And what bank and when and how much, if any, was robbed?

DEFENDANT TOMMY RAY HIGDON: November 20th, the Bank of Terral, Oklahoma, something like $7,000.

THE COURT: Very well. Do you know and understand the maximum sentence provided by Congress for such an offense?

DEFENDANT TOMMY RAY HIGDON: Yes, sir, I do.

THE COURT: And what is that?

DEFENDANT TOMMY RAY HIGDON: Twenty-five years.

THE COURT: Very well.

MR. BURKETT: If the Court please, excuse me, your Honor, but the penalty also includes a fine of not more than $10,000, or both, either or both fine and imprisonment.

THE COURT: You understand that?

DEFENDANT TOMMY RAY HIGDON: Yes, sir.

THE COURT: All right. Understanding the charge against you and understanding the penalty affixed by Congress, how do you plead to the indictment in this case?

DEFENDANT TOMMY RAY HIGDON: Guilty.

THE COURT: The Court will ask you, are you guilty?

DEFENDANT TOMMY RAY HIGDON: Yes, sir, I am.

THE COURT: Has anyone said anything, done anything, or promised you anything to induce you to enter this plea of guilt in this case?

DEFENDANT TOMMY RAY HIGDON: No, they haven't.

THE COURT: Then is it of your own free will and accord?

DEFENDANT TOMMY RAY HIGDON: Yes, sir, it is.

THE COURT: Now in this case you were charged along with your wife, is that right?

DEFENDANT TOMMY RAY HIGDON: Yes, sir.

THE COURT: Yesterday the Court was presented with a suggestion of the District Attorney to dismiss this case as to your wife, Iva Lee Higdon; did you know about that?

DEFENDANT TOMMY RAY HIGDON: Yes, sir.

THE COURT: Does that have anything to do with your entering this plea of guilt today?

DEFENDANT TOMMY RAY HIGDON: No, sir, it doesn't.

THE COURT: Are you sure of that?

DEFENDANT TOMMY RAY HIGDON: Yes, sir, I am.

THE COURT: Do you understand that notwithstanding the fact that case No. 70-29 yesterday was dismissed as to your wife, a charge was filed by way of information against her? You understand that, don't you?

DEFENDANT TOMMY RAY HIGDON: Yes, sir.

THE COURT: And in the information she is charged as an accessory, is it?

MR. BURKETT: Yes, sir, accessory after the fact.

THE COURT: After the fact. You understand that?

DEFENDANT TOMMY RAY HIGDON: Yes, sir.

THE COURT: And you are sure and you are telling the Court now that the dismissal as to your wife and refiling on a lesser offense has nothing to do with your plea of guilt here today?

DEFENDANT TOMMY RAY HIGDON: Yes, it doesn't have.

THE COURT: This was all done, of course, yesterday.

Mr. Abel, are you in accord with this plea?

MR. ABEL: Yes, your Honor, I am.

I might state for the record, your Honor, this is a case in which, if your Honor will recall, the Court permitted us to have an investigator and we have, we feel, very thoroughly investigated this case, and after a review of all of the evidence the Government has and a review of all of our investigation, I would state to the Court that I am in accord with this plea.

THE COURT: Who was the investigator you had in this case?

MR. ABEL: Mr. Robert Cunningham, your Honor.

THE COURT: Has he furnished you with a written report of his investigation?

MR. ABEL: Yes, he has, your Honor, a summary of the interviews that he has conducted with the various police departments and F.B.I. agents, and the personnel at the bank in question.

I have also reviewed the respective testimony of the prospective Government witnesses, reviewed the documents in question.

THE COURT: Yes.

Mr. Burkett, do you have anything to say?

MR. BURKETT: Yes, I do, your Honor.

I'd like to inquire of the defendant if he realizes that by withdrawing his plea of not guilty and entering a plea of guilty here, that you are waiving your right to a jury trial.

DEFENDANT TOMMY RAY HIGDON: Yes.

MR. BURKETT: You understand you have a right to have the matter submitted to a jury. You want to waive that right?

DEFENDANT TOMMY RAY HIGDON: Yes, sir.

MR. BURKETT: You also understand you are waiving your right to the privilege against compulsory self-incrimination, your right to confront your witnesses, your accusers?

DEFENDANT TOMMY RAY HIGDON: (Nods affirmatively)

MR. BURKETT: Let me ask you, did you in fact about the 26th of November, 1969, rob the First National Bank

of Terral, Oklahoma of approximately $6,760, and in the course of that robbery did you use a firearm?

DEFENDANT TOMMY RAY HIGDON: Yes, sir, I did.

MR. BURKETT: I have nothing further, your Honor.

THE COURT: Very well. Let the record show that the Court finds from the examination of the accused and the statement of his attorney—first, I further would like to ask you, Mr. Higdon, as you know, the Court has appointed Mr. Abel as your attorney, Edward D. Abel, who has acted as your attorney, I guess, from shortly after the time of the indictment. Maybe before; did you act before?

MR. ABEL: No, sir, I didn't.

THE COURT: Have the services rendered you by Mr. Abel been in all things satisfactory to you?

DEFENDANT TOMMY RAY HIGDON: Yes, sir, they have.

THE COURT: Are you in any way displeased with his services?

DEFENDANT TOMMY RAY HIGDON: No, sir.

THE COURT: Would you have changed attorneys if you could?

DEFENDANT TOMMY RAY HIGDON: No, sir.

THE COURT: You understand this is for the record. The Court wants to know these things, and I am sure Mr. Abel does, too.

Let the record show that the Court finds that Mr. Tommy Ray Higdon has entered his plea of guilt to the indictment in this case, that is of bank robbery of the First National Bank of Terral, Oklahoma, of approximately $7,000. The indictment sets out specifically the sum of $6,760.

That the plea of guilt has been entered freely, voluntarily, knowingly and understandingly; that there has been no duress, threats, promises of any kind made to Mr. Higdon to induce him to enter the plea of guilt.

Now before the Court can pronounce sentence in your case, it will be necessary that I be furnished a pre-sentence report. I will ask the probation officer, one of them, Mr. Payne is here now, to get me a report. Some time after next week the Court will be in a position to pronounce sentence in this case.

You may take your seat.

(Defendant Tommy Ray Higdon is seated)

THE COURT: What further business do you have before the Court, Mr. Burkett?

MR. BURKETT: If the Court please, Iva Lee Higdon is present in person and with her Court appointed attorney, Edwin Abel.

This matter comes on for Waiver of Indictment. We have a proposed one count indictment charging Iva Lee Higdon, charging that on or about the 26th of November, 1969, in the Western District of Oklahoma, Iva Lee Higdon, knowing that Tommy Ray Higdon had committed a bank robbery in violation of Section 2113 (a) and (d) of Title 18, U. S. Code, did knowingly, wilfully relieve, receive, comfort and assist the said Tommy Ray Higdon in order to hinder and prevent his apprehension for trial and punishment.

The defendant has received a copy of the proposed information. The matter comes on now for waiver of indictment and filing.

The maximum penalty if the defendant is convicted or elects to plead guilty is twelve and a half years imprisonment or $5,000 fine or both, that being half of the penalty—

THE COURT: The penalty is what?

MR. BURKETT: Twelve and a half years imprisonment or a fine of $5,000, not more than $5,000, or both.

THE COURT: Yes.

MR. BURKETT: That's half the penalty, your Honor, of the principal.

THE COURT: Yes.

MR. BURKETT: That she is alleged to have assisted.

THE COURT: She assisted, rather than being a principal.

MR. BURKETT: Yes, sir.

The defendant is 25 years old, your Honor, so that the provisions of the Federal Youth Correction Act might apply.

THE COURT: You propose to file this now?

MR. BURKETT: Yes, I do.

THE COURT: Very well.

Before it is filed, of course, the Court must have an understanding and know that she knows that she is waiving her right to a grand jury hearing, and also appointment of attorney.

Now I have appointed—I don't guess anyone has appointed Mr. Abel to represent her in this new case; but, Mr. Abel, inasmuch as you are familiar with this case and familiar with her previous case, that knowledge of course is important to the attorney.

So the Court formally now appoints you as her attorney to represent her in this proposed matter, if that's agreeable with you.

MR. ABEL: That's agreeable with me, your Honor.

THE COURT: And if that is agreeable with Mrs. Higdon; is that agreeable?

DEFENDANT IVA LEE HIGDON: Yes, sir.

THE COURT: Now this is a new case, and under the law you have a right to require the District Attorney to present any matter that he might have in the way of complaint against you to a grand jury. You understand that?

DEFENDANT IVA LEE HIGDON: Yes, I understand.

THE COURT: You can waive that right if you want to.

DEFENDANT IVA LEE HIGDON: Yes, sir.

THE COURT: Have you discussed this matter with your attorney; Mr. Abel, have you discussed it with her?

MR. ABEL: Yes, sir, your Honor, we have discussed it.

THE COURT: Can you make a statement to the Court in connection with this matter?

MR. ABEL: Yes, sir, your Honor. It's our desire at this time to waive the grand jury.

THE COURT: Very well. You may let her sign the paper evidencing her willingness to waive.

MR. BURKETT: Let the record show that the written Waiver of Indictment by Grand Jury has been filed.

THE COURT: All right. Now inasmuch as the charges now are filed with the Clerk, do you have a further statement to make, Mr. Burkett?

MR. BURKETT: I believe, your Honor, that the defendant desires to enter a plea at this time.

THE COURT: Very well. Mrs. Iva Lee Higdon, are you now ready to enter a plea in this case?

DEFENDANT IVA LEE HIGDON: Yes, your Honor.

THE COURT: Before she enters such a plea, do you understand what you are charged with?

DEFENDANT IVA LEE HIGDON: Yes, sir, I do.

THE COURT: And what are you charged with, for the record?

DEFENDANT IVA LEE HIGDON: Accessory after the fact, bank robbery, Terral, Oklahoma, November 26th.

THE COURT: Do you understand the maximum sentence provided by law for this offense?

DEFENDANT IVA LEE HIGDON: Yes, sir, I believe so.

THE COURT: And what is it?

DEFENDANT IVA LEE HIGDON: Twelve and a half years or $5,000 fine, or both.

THE COURT: Knowing these things, have you conferred with your attorney, Mr. Abel, in connection with this case?

DEFENDANT IVA LEE HIGDON: Yes, sir.

THE COURT: Is there anything about it that you do not understand?

DEFENDANT IVA LEE HIGDON: No, sir.

THE COURT: Knowing the charge and the maximum punishment provided by Congress for such an offense, how do you plead to the one count information or charge?

DEFENDANT IVA LEE HIGDON: Guilty.

THE COURT: The Court will ask you, are you guilty?

DEFENDANT IVA LEE HIGDON: Yes, sir.

THE COURT: And for the record, just what did you do in connection with accessory after the fact?

DEFENDANT IVA LEE HIGDON: I drove the car for Tommy.

THE COURT: From where and when?

DEFENDANT IVA LEE HIGDON: From Terral, Oklahoma to Nocona.

THE REPORTER: To where?

MR. BURKETT: Nocona.

DEFENDANT IVA LEE HIGDON: Nocona.

THE COURT: You mean you picked him up after the bank had been robbed?

DEFENDANT IVA LEE HIGDON: Yes, sir.

THE COURT: In a car?

DEFENDANT IVA LEE HIGDON: Yes, sir.

THE COURT: And drove him to Texas?

DEFENDANT IVA LEE HIGDON: Yes, sir.

THE COURT: Did you know he had robbed the bank?

DEFENDANT IVA LEE HIGDON: Yes, sir.

THE COURT: Did you know in the robbery he had gotten close to $7,000?

DEFENDANT IVA LEE HIGDON: I didn't know exactly how much.

THE COURT: Till he counted the money, you mean?

DEFENDANT IVA LEE HIGDON: Pardon?

THE COURT: Had he counted the money?

DEFENDANT IVA LEE HIGDON: No, sir, I never counted the money.

THE COURT: Are you satisfied with the services that have been rendered to you and for you by Mr. Abel?

DEFENDANT IVA LEE HIGDON: Yes, sir.

THE COURT: Would you change attorneys if you could?

DEFENDANT IVA LEE HIGDON: No, sir.

THE COURT: Is there anything about his services that has been displeasing to you in any degree?

DEFENDANT IVA LEE HIGDON: No, sir.

THE COURT: Let the record show that the Court finds that Defendant Iva Lee Higdon enters a plea of guilt to the count in the information and charge freely and voluntarily, knowingly and understandingly, and with full knowledge of all the implications growing out of the plea of guilty.

MR. BURKETT: May I inquire of the defendant briefly?

THE COURT: Yes.

MR. BURKETT: Mrs. Higdon, has anybody made you any promises or any threats in any way in order to coerce this plea?

DEFENDANT IVA LEE HIGDON: No.

MR. BURKETT: You understand you are giving up your right to a jury trial?

DEFENDANT IVA LEE HIGDON: Yes, sir.

MR. BURKETT: That's all, your Honor.

THE COURT: Mr. Abel, you have recommended, I take it, that she enter this plea under the circumstances?

MR. ABEL: Yes, sir, that was my recommendation.

THE COURT: Do you have just cause for your recommendation; that is, you are convinced that—

MR. ABEL: Yes, sir, I believe I do, your Honor, based on what I said in regard to Mr. Higdon's case. Of course the same investigation applied to this defendant, and I am taking into consideration in my recommendation the investigation which my investigator reported for me, plus my review of the U. S. Attorney's files and the prospective testi-

many of the prospective witnesses, and based upon that, your Honor, I have recommended that she enter a plea of guilty to this charge.

THE COURT: Very well.

I will say that I have no idea what the jury would have done. Of course no one knows what a jury would do, but from my review of the file before and during the pre-trial conference, I would have been surprised if a jury had acquitted either one of these defendants, truly would have been surprised from the record that I read in the pre-trial conference and growing out of the pre-trial conference, the matters that I read in camera.

So with these things, I want you to know, Mrs. Higdon and Mr. Higdon, that the punishment in this case is not going to be a token punishment at all. It's a serious problem and a serious offense.

You go out and rob a bank with a gun, or rob anything. It happens when you rob a bank it's a federal offense. Robbing a filling station is not. Robbing a bank is a federal offense because the Federal Government guarantees those deposits.

It's no worse than robbing a filling station or a grocery store. They are all probably the worst crimes that I know of except murder.

You may take your seat.

I forgot to tell you, before the Court can pronounce sentence, I will have to have a pre-sentence report. The probation office will see to that.

MR. ABEL: In view of the Court's comments prior to the time the Court has received this pre-sentence report, I would like for the Court especially in regard to the sentencing of Mrs. Higdon—

THE COURT: (Interposing) I'm not going to sentence her today.

MR. ABEL: I know you are not going to sentence her today, but—

THE COURT: I'll give you all the time you want to talk either now or then, but I just don't want her thinking that a plea of guilt is going to bring about something less than token punishment.

MR. ABEL: Yes, sir, and I'm sure the Court is going to keep an open mind.

THE COURT: Oh, sure.

MR. ABEL: I want the Court to review that pre-sentence report and keep in mind that this was this lady's husband and also keep in mind that she has no record.

THE COURT: Well, that probably will all show in the pre-sentence report.

MR. ABEL: I'm sure that it will, your Honor.

THE COURT: Very well, you may take your seat.

(Defendant Iva Lee Higdon is seated)

(The proceedings are adjourned.)

PROCEEDINGS AT SENTENCING
April 3, 1970

THE COURT: The next case is the case of the United States versus Tommy Ray Higdon and Iva Lee Higdon.

Mr. Abel?

MR. ABEL: Yes, sir.

THE COURT: The Court appointed you in these cases and they have entered a plea of guilt for bank robbery with arms.

Before the Court pronounces sentence in these cases, that is husband and wife, Tommy Ray Higdon and Iva Lee Higdon, I will ask you first, Mr. Abel, do you have anything

to say as to why the Court should not now pronounce sentence in these cases or anything in the way of mitigation?

We will take up first Tommy Ray Higdon, then Iva Lee Higdon, his wife.

MR. ABEL: Yes, your Honor, not as to why the Court should not now pronounce sentence at this time, but in the way of mitigation.

Your Honor will recall that this is a case in which the Court appointed, or allowed me to hire an investigator to investigate the facts in this case.

THE COURT: I remember very well.

MR. ABEL: I think that the Court should take into consideration that although this was the robbery of a bank, that at no time was any actual violence used in this robbery.

I think the Court should further take into consideration the ages of these people. I think the Court should take into consideration that the Defendant Tommy Ray Higdon has voluntarily admitted his guilt, has accepted that guilt. I think the defendant has indicated that he realizes that he has made a mistake in what he did; and I think the Court ought to take that into consideration in setting sentence.

THE COURT: Yes.

The Court will hear from you also—are you through?

MR. ABEL: With that, yes, I am, your Honor.

THE COURT: The Court will hear from you also with relation to Mrs. Higdon.

MR. ABEL: Your Honor, with regard to Mrs. Higdon's case, she is now not under a charge of bank robbery, but rather it's a charge of accessory after the fact.

I think that is important, your Honor. I think the Court ought to take that into consideration.

(APPENDIX)

I just do not and did not at the time that she was originally charged feel that the evidence was strong with regard to the original charge that was filed.

I think further that with regard to Mrs. Higdon's case, the Court ought to take into consideration the fact that she has no record at all.

I think the Court ought to take into consideration that Tommy is her husband and that never did Mrs. Higdon enter the town of Terral, Oklahoma, and never did Mrs. Higdon enter the bank, never did she ever have a gun in her possession or never did she put anybody's life in danger.

I think the Court also ought to take into consideration, I don't recall if it's shown in the pre-sentence report, but I know the United States Attorney's office has informed the probation office they have no objection to her receiving probation.

THE COURT: They don't have anything to do with it.

MR. ABEL: I know they don't, but I want the Court to know that fact.

THE COURT: Well, that doesn't make any difference.

MR. ABEL: Okay.

I think the Court also ought to take into consideration, in line with the fact that these two people are married, that Mrs. Higdon was certainly under the influence of her husband.

The whole scheme was not the idea of Mrs. Higdon. The only thing she did was drive an automobile, and I think that the Court can understand why Mrs. Higdon might not have turned her own husband in or might not do anything anything to turn him over to the authorities.

Nothing was done in the way of a violent resistance of arrest. Both of this couple voluntarily came back into the state of Oklahoma, submitted themselves to the jurisdiction of this court.

I am especially strong in my urging for probation for Mrs. Higdon. There isn't any question she was wrong in going along with her husband. There isn't any question she was wrong in being where she was.

What she should have done was said, "I'll have no part of it," and stayed at home; but she didn't actually commit any overt act for which I think she ought to serve time in the penitentiary.

I think she ought to be given a chance. If she ever gets in trouble again, she's going to have to live with this present conviction and it's not as though the Court would just be saying, "Well, it's all right. We'll excuse you for whatever you have done."

She will carry this with her the rest of her life, but I think that she has had enough punishment. She has served already considerable time in the county jail here in Oklahoma City, and I think she realizes the gravity of the acts that she committed.

We strongly urge the Court that she be given probation.

THE COURT: Very well. I thank you, Mr. Abel. You have represented your clients here very ably.

Now Mr. Higdon, before the Court pronounces sentence in your case, do you have anything to say as to why the Court should not now pronounce sentence?

DEFENDANT TOMMY RAY HIGDON: No.

THE COURT: Or anything in the way of mitigation?

DEFENDANT TOMMY RAY HIGDON: No, I don't.

THE COURT: Let the record show the defendant has nothing to say.

Now Mrs. Higdon, before the Court pronounces sentence in your case, do you have anything to say as to why the Court should not now pronounce sentence?

DEFENDANT IVA LEE HIGDON: No, sir.

MR. ABEL: Your Honor, may I have a moment?

Your Honor, I failed to mention this, that if Mrs. Higdon receives probation from the Court, arrangements have been made that she will live with her mother-in-law in Dallas, so she will have a place to stay.

THE COURT: Well, it's very nice, but the way the Court looks at these things and the way Congress looked at them is not the way you look at them, Mr. Abel.

It will be the order and judgment of the Court, Mr. Higdon, that you be committed to the custody of the Attorney General for a period of twenty years. It would have been more if I'd had to try this case to the jury and the jury found you guilty. I don't think there is any crime that's any more despicable than to go and get a gun and go into a bank, filling station or merchandising store, and stick a gun in a man's face or his chest or his belly, or his back or whatever it is, and say, "Give me all the money you've got."

I think that's just, well, it's just wrong to the extent that Congress has fixed twenty-five years and a $20,000 fine.

Now then, to you, Mrs. Higdon, you weren't quite as deep as he is and the law doesn't quite punish you as much as he gets; but you were an accessory after the fact just as much as anyone could be.

The fact that you are a little lady doesn't make any difference to the law.

It will be the order and judgment of the Court that you be committed to the custody of the Attorney General for a period of ten years.

All right, you may take your seat.

(The proceedings at sentencing are adjourned.)

[APPENDIX]

CERTIFIED A TRUE TRANSCRIPT
May 21, 1970

FRANK M. SICKLES,
Official Court Reporter; Northern,
Eastern & Western Districts of Okla.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1303

IVA LEE HIGDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner pleaded guilty in the United States District Court for the Western District of Oklahoma to being an accessory after the fact (18 U.S.C. 3) to armed robbery of a federally insured bank by her husband, who simultaneously pleaded guilty to that offense (18 USC 2113(d)).[1] After a thorough examination (Pet. App. XI-XVII), the district judge

[1] Petitioner's husband, Tommy Ray Higdon, has filed a separate petition for a writ of certiorari to which we have filed a separate response, No. 6482, this Term.

accepted the pleas and deferred sentencing until after receipt and review of the presentence reports. The judge indicated at the time that he regarded robbery as a serious offense (Pet. App. XVII-XVIII). Thereafter, the judge sentenced petitioner to imprisonment for ten years and her husband to a twenty-year prison term. The court of appeals affirmed *per curiam* (Pet. App. A).

Petitioner contends here, as in the court of appeals, that the trial judge abused his discretion in sentencing her to imprisonment, alleging that the district judge failed to give due weight to the information available to him, including the fact that the prosecutor had stated that he did not oppose probation. The record is plain, however, that the trial judge considered the presentence reports in imposing sentence and there is no showing that he abused his broad sentencing discretion in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1971.

* U. S. GOVERNMENT PRINTING OFFICE: 1971 [illegible]